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Bankruptcy—Dischargeability of Debts Arising from Willful and Malicious Injuries: The Eighth Circuit Assaults Bankruptcy Creditors. [In Re Hartley, 874 F.2d 1254 (8th Cir. 1989) and In re Le Maire, 898 F.2d 1346 (8th Cir. 1990)]

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BANKRUPTCY—DISCHARGEABILITY OF DEBTS ARISING FROM WILLFUL AND MALICIOUS INJURIES: THE EIGHTH CIRCUIT ASSAULTS BANKRUPTCY CREDITORS

[*In re Hartley*, 874 F.2d 1254 (8th Cir. 1989) and *In re Le Maire*, 898 F.2d 1346 (8th Cir. 1990)]

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INTRODUCTION

Under present bankruptcy law, an individual debtor may escape liability for a debt while making either no payment or less than full payment toward its satisfaction.¹ An individual debtor may elect to proceed with either a Chapter 7 liquidation or a Chapter 13 debt adjustment.² Chapter 7 bankruptcy discharges an individual's un-

1. See Lander, *An Analysis and Comparison of the Nondischargeability Provisions of Chapter 11 and Chapter 13 of the Bankruptcy Code*, 27 ST. LOUIS U.L.J. 639, 639-40 (1983).

2. See 11 U.S.C. §§ 701-766 (1988); 11 U.S.C. §§ 1301-1330 (1988).

secured debts in exchange for his surrender of all of his non-exempt property. Chapter 13 requires the debtor to pay a portion of the debt over time before it can be discharged.³

The Bankruptcy Code⁴ creates narrow exceptions under which an individual debtor may not discharge certain debts.⁵ Among these exceptions is section 523(a)(6) which excepts from discharge any debt for "willful and malicious injury by the debtor to another entity."⁶ The success of a creditor's attempt to except his claim from discharge under this rule turns on the nature of the underlying act. Where the injury is caused by negligence, the debt has traditionally been held dischargeable.⁷ Where, on the other hand, the injury is caused by deliberate and intentional wrongdoing, the creditor's claim has traditionally been held nondischargeable.⁸

In a recent en banc decision, the Eighth Circuit Court of Appeals considered the dischargeability of a debt arising from a civil assault which resulted in either an intentional assault and/or battery, or a "negligent assault."⁹ In *In re Hartley*¹⁰ the court found itself a house divided, splitting five to five on the issue of dischargeability.¹¹ The court thereby affirmed the district court's decision which held nondischargeable a debt arising from an intentional act by the debtor that caused unintended physical injury.¹² The Eighth Circuit stand-off is significant because it represents the lack of certainty and uniformity with which courts throughout the country are handling cases

3. Lander, *see supra* note 1, at 639-40. Under Chapter 13 debt adjustment, the debtor proposes to the bankruptcy court a plan for repaying the unsecured creditors. *Id.* Depending upon the amount of the debtor's disposable income, the repayment "dividend" may range from zero to one hundred percent of the total debt owed. *Id.* Upon confirmation of the plan by the court and subsequent completion of the plan by the debtor, the remainder of the unpaid debts are then discharged. *Id.* at 640. Hence the debtor's debt has been readjusted.

4. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1988).

5. 11 U.S.C. § 523(a) (1988) sets forth ten types of debts which are not dischargeable for an individual debtor proceeding in bankruptcy under Chapter 7.

6. 11 U.S.C. § 523(a)(6) (1988). It should be noted that "wilful" is a variant spelling of "willful."

7. 8A C.J.S. BANKRUPTCY, § 332 (1988).

8. *See In re Hartley*, 874 F.2d 1254 (8th Cir. 1989).

9. A "negligent assault" (or battery) is one where, though a judgment is or may be had for assault, the "real nature of the defendant's liability [is] negligence and not an intentional assault" (or battery). Annotation, *Claim or judgment based on assault and battery as liability for wilful and malicious injury within § 17(2) of Bankruptcy Act (11 U.S.C. § 35(2))* barring discharge of such liability, 63 A.L.R.2d 549, 563 (1959) [hereinafter Annotation] (the sections discussed in the annotation are precursors of present section 523(a)(6)).

10. *In re Hartley*, 874 F.2d 1254 (8th Cir. 1989).

11. *See id.*

12. *In re Hartley*, 100 B.R. 477, 480 (W.D. Mo. 1988). Four decisions have been rendered in the bankruptcy case of James Lee Hartley. *See infra* note 71.

that fall under section 523(a)(6).¹³ Given the disparate treatment of debts arising as a result of intentional tortious conduct, it is imperative that Congress clarify the standards underlying application of this exception to discharge.¹⁴

The Eighth Circuit has recently demonstrated some sensitivity to the plight of victims of debtor intentional tortious conduct. In *In re Le Maire*,¹⁵ the court limited the broad discharge of section 1328 by refusing to allow a Chapter 13 debtor to adjust a debt arising as a result of his willful and malicious conduct. The court held, in essence, that the debtor's attempt to avoid responsibility for payment of the debt by filing Chapter 13 bankruptcy was strong evidence of bad faith.¹⁶

The court's willingness to force the debtor to assume responsibility for his willful and malicious conduct, even where a Chapter 13 debtor has traditionally been allowed to escape such responsibility, evidences a greater concern for the victims of a debtor's intentional torts.¹⁷ The court's holding, however, leaves three questions unanswered. First, has the court's holding in *Le Maire* written an exception for willful and malicious conduct into the discharge provisions of section 1328? Second, what will the practical effect of such an exception be given the high standard of willful and maliciousness under section 523(a)(6)?¹⁸ Finally, is the en banc decision in *Le Maire* merely constrained to its egregious facts?

I. ELECTING BETWEEN A CHAPTER 7 OR CHAPTER 13 PROCEEDING

As indicated above, an individual debtor may proceed in bankruptcy under either a Chapter 7 liquidation or a Chapter 13 debt adjustment.¹⁹ Under Chapter 7, the pre-filing non-exempt assets of the debtor are liquidated and used to pay the debtor's pre-filing liabilities.²⁰ Under Chapter 13, the debtor proposes a plan to repay his creditors a percentage of his unsecured debts.²¹ Thus a Chapter 7 debtor sacrifices present non-exempt assets, while a Chapter 13

13. Compare *In re Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986) (only proof of an intentional act which leads to injury is required, rather than proof of intent to injure) with *In re Compos*, 768 F.2d 1155, 1159 (10th Cir. 1985) (willful and malicious injury requires proof of intent to injure).

14. Congress did attempt to clarify its intent on how section 523(a)(6) should be interpreted, yet a greater split of authority continues, indicating the need for further action.

15. *In re Le Maire*, 898 F.2d 1346 (8th Cir. 1990).

16. *Id.* 1353.

17. See *id.*

18. See *infra* note 108.

19. See *supra* note 2.

20. Lander, *supra* note 1, at 639-40.

21. *Id.*

debtor sacrifices future disposable income.²² All dischargeable debts are discharged following completion of the asset liquidation or re-payment plan.²³

An individual debtor who has "regular income" may elect to proceed under either chapter. Discharge of all debts is the goal of the debtor.²⁴ The rational debtor, therefore, will select the bankruptcy option that will facilitate the broadest discharge available, while preserving as many assets and as much income as possible. To select the best option, the debtor must compare the Chapter 7 and Chapter 13 discharge provisions.²⁵

Under Chapter 7, the bankruptcy court must allow an individual debtor a discharge of all debts unless one or more of the specific grounds for denial of discharge under section 727(a) is found to exist.²⁶ These grounds relate to debtor misconduct and require full disclosure of all property and prepetition transfers by the debtor.²⁷ The court must confirm a Chapter 13 plan if the plan satisfies seven prerequisites enumerated in section 1325.²⁸ This determination usually comes down to one issue: whether "the plan has been proposed in good faith" by the debtor.²⁹

Because most debtors have only a minimal amount of non-exempt assets, the scope of the discharge provision is the foremost consideration in determining under which chapter to proceed. A Chapter 7 discharge is for all debt, arising before the date of the order for relief, except for those debts declared nondischargeable by section 523(a).³⁰

A Chapter 13 discharge applies to all debts provided for by the plan, except for two types of debts: 1) installment debts which extend beyond the term of the plan; and 2) alimony, maintenance, and child support debts.³¹ Thus, nine of the ten section 523(a) debts

22. An unsecured creditor may object to a plan unless the debtor pays to the creditors all disposable income over a three year period. 11 U.S.C. § 1325(b)(1)(B) (1988).

23. 11 U.S.C. § 1328 (1988).

24. B. WEINTRAUB & A. RESNICK, *BANKRUPTCY LAW MANUAL* §§ 1.01-14 (1980 & Supp. 1988).

25. 11 U.S.C. § 727 (1988) is the operative discharge section of the Code for a Chapter 7 proceeding, and 11 U.S.C. § 1328 (1988) defines the scope of the Chapter 13 discharge.

26. 5 *COLLIER ON BANKRUPTCY* § 1328.01[1][c], (15th ed. 1989) [hereinafter *COLLIER*].

27. See 11 U.S.C. § 727(a) (1988). See also 4 *COLLIER supra* note 26, at § 727.01-12. The denial provisions of section 727 apply only to Chapter 7 proceedings. 11 U.S.C. § 103(b) (1988).

28. 11 U.S.C. § 1325; see *infra* note 171.

29. 11 U.S.C. § 1325(a)(3); see also *COLLIER, supra* note 26, at 1328-5.

30. See 11 U.S.C. § 523(a) (1988).

31. 11 U.S.C. § 1328(a) (1988) provides that:

may be discharged under Chapter 13.³²

If a debtor has few or no non-exempt assets, a Chapter 7 proceeding will best achieve the goal of discharging debts while preserving assets and future income. This is the chapter under which the debtor in *Hartley* proceeded. If the debtor is seeking to discharge a debt which is not dischargeable under Chapter 7, a Chapter 13 proceeding has traditionally been the best alternative. This is the chapter under which the debtor in *Le Maire* chose to proceed.

II. HISTORY OF THE EXCEPTION FOR WILLFUL AND MALICIOUS CONDUCT

The historical purpose of allowing discharge of debts in bankruptcy is to allow the "honest but unfortunate debtor" a "fresh start" in life, free from the oppressive liabilities incurred before bankruptcy.³³ The rationale is two-fold. First, post-petition wages are fundamental to the debtor's ability to earn a livelihood. Second, if all one's earnings are going to a creditor, there is less incentive to work, with poverty the likely result.³⁴ The section 523(a)(6) excep-

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

- (1) provided for under section 1322(b)(5) of this title; or
- (2) of the kind specified in section 523(a)(5) of this title.

Section 1322(b)(5) excepts from discharge "any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due" Section 523(a)(5) excepts from discharge debts owed "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child"

32. The only section 523(a) debt nondischargeable under Chapter 13 is section 523(a)(5). See 11 U.S.C. § 1328(a)(2) (1988).

33. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). *Local Loan Co.* is well known in bankruptcy law for this passage:

This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the *honest but unfortunate debtor* who surrenders for distribution the property which he owns at the time of the bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Id. at 244 (emphasis added). "The two most important aspects of the fresh start available under the Bankruptcy laws are the provision of adequate property for a return to normal life, and the discharge, with the release from creditor collection attempts." HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY LAW REVISION, H.R. REP. NO. 595, 95th Cong., 1st Sess. 125 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6086 (hereinafter *BANKRUPTCY LAW REVISION*). For a brief overview of the historical rationale behind bankruptcy law see Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C.L. REV. 723, 724-25 (1980).

34. *Local Loan Co.*, 292 U.S. at 245. The Court states that discharge in bankruptcy is of "public as well as private interest." *Id.* at 244. It is clear to see how this

tion from discharge for debts incurred as a result of willful and malicious injury clearly does not come within the purview of this rationale.³⁵

An exception for "willful and malicious" injuries has been in effect since 1898.³⁶ In 1904 the United States Supreme Court in *Tinker v. Colwell*³⁷ interpreted this statutory phrase.³⁸ The Court held that an act which causes injury is willful if it is voluntary.³⁹ Malice, the Court found, in its legal sense means "a wrongful act, done intentionally, without just cause or excuse."⁴⁰ Malice does not require "a malignant spirit or a specific intention to hurt" the creditor.⁴¹ Rather, malicious intent is manifested by an injurious act committed in disregard of the rights of another.⁴² Therefore, where one acted with a "willful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally," the law implied malice.⁴³

policy benefits the public. If a debtor is not allowed to discharge debts, as a rationale exercise of choice, that debtor may cease gainful employment and become a public charge, to be supported by the taxpayers: "From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either." *Id.* at 245. Allowing discharge also serves "as an incentive to further [the debtor's] honest effort to obtain a livelihood." *In re Levenstein*, 180 F. 957, 958 (D. Conn. 1910).

It is also clear to see how the policy benefits the debtor. What is less clear is how discharge benefits the private interest—the particular creditor involved. *But see infra* notes 140–141 and accompanying text.

35. Were such a debt freely dischargeable there would be less incentive to avoid intentional harm to another, and it would work a greater inequity by shifting to the injured creditor the entire harm caused by the debtor.

36. The present 11 U.S.C. § 523(a)(6) has been in effect since October 1, 1979, the date upon which the Bankruptcy Reform Act of 1978 superseded the Bankruptcy Act of 1898. Former 11 U.S.C. § 35(a)(8) contained a similar provision. Section 17(a)(2) of the 1898 Act excepted from discharge debts for "wilful and malicious injuries to the person or property of another." Act of July 1, 1898, ch. 541, § 17(a)(2), 30 Stat. 544, 550, *repealed by* Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101–1330 (1979).

37. 193 U.S. 473 (1904).

38. *Tinker* was a bankruptcy case under former section 17(a)(2) in which the underlying judgment against the debtor was for criminal conversation. The creditor husband had thereby suffered an injury to his property—his wife (with whom the debtor had sexual intercourse). The question presented was whether such a tortious act by the debtor was "willful and malicious" within the meaning of the statute. *Id.* at 480.

39. *Id.* at 486.

40. *Id.* at 485–86.

41. *Id.* at 487.

42. *Id.* at 486–87.

43. *Id.* at 487.

A. Statutory Law—Congressional Intent

The “reckless disregard” interpretation of “willful and malicious” was a settled proposition, and for seventy-five years it was clear what was meant by this phrase.⁴⁴ But when Congress repealed the Bankruptcy Act of 1898 and replaced it with the Bankruptcy Reform Act of 1978, it expressly overruled *Tinker*.⁴⁵ A United States House of Representatives Report stated “‘willful’ means deliberate or intentional;” to the extent that prior cases relied upon the looser “reckless disregard” standard of *Tinker v. Colwell* they are overruled.⁴⁶ This congressional action has led to great confusion and a split of authority among the United States circuit courts in how to apply section 523(a)(6).⁴⁷

B. Examination of Other Jurisdictions

Some courts have held that for a debt to be excepted from discharge the debtor must have intended not only his act, but also the harm which resulted from his act.⁴⁸ It has been held that the word “willful” modifies “injury,” thereby requiring not merely an intentional act which causes injury but rather an “intentional or deliberate injury.”⁴⁹ An act in reckless disregard of the rights of others does not rise to the level of “willful and malicious” conduct.⁵⁰ Congress

44. *In re Hodges*, 4 Bankr. 513, 515 (Bankr. W.D. Va. 1980).

45. BANKRUPTCY LAW REVISION, *supra* note 33, at 363. S. REP. NO. 989, 95th Cong., 1st Sess. 77–79 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5863–65.

46. *Id.*

47. Note, *In re Cecchini: Willful and Malicious Injury—Nondischargeability in Bankruptcy*, 17 PAC. L.J. 1511, 1520 (1986) (authored by Jeffrey H. Ochrach).

48. This strict interpretation is perhaps best exemplified by *In re Hodges*, 4 Bankr. 513, 516–17 (Bankr. W.D. Va. 1980) (“reckless disregard” standard and/or negligence is insufficient, “malicious” requires a subjective intent to do harm by debtor and cannot be implied, both “willful” and “malicious” must be shown). *But see* *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1009–10 (4th Cir. 1985) (implied malice is sufficient, since to require proof of subjective malice “would restrict § 523(a)(6) to the small set of cases where the debtor was foolhardy enough to make some plainly malevolent utterance expressing his intent to injure his creditor”).

49. *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985) (drunken driving debt dischargeable under section 523(a)(6) because Congress rejected the *Tinker* “reckless disregard” standard in favor of requiring finding of intentional injury). *But see In re Adams*, 761 F.2d 1422, 1427 (9th Cir. 1985) (section 523(a)(6) should be construed in light of Congress’ July 1984 enactment of section 523(a)(9), so the act of driving while intoxicated is sufficiently intentional to find willfulness and malice as contemplated by section 523(a)(6)).

50. *In re Wrenn*, 791 F.2d 1542, 1544 (11th Cir. 1986) (reckless disregard was “insufficient to support a finding of ‘willful and malicious’ injury” in awarding attorneys fees). *Accord In re Held*, 734 F.2d 628, 629 (11th Cir. 1984) (in awarding punitive damages, the jury’s possible basis on recklessness did not reach to the level of willful and maliciousness). *But see Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257,

expressly overruled the *Tinker* "reckless disregard" standard for dischargeability.⁵¹ Section 523(a)(6) is to be narrowly construed, and both willfulness and malice must be found.⁵²

Other courts have held that for a debt to fall under the exception to dischargeability, a finding of constructive malice is sufficient; a subjective showing of the debtor's intent to do harm is not required.⁵³ Thus it has been held that implied or constructive malice satisfies section 523(a)(6),⁵⁴ and that a specific intent to do harm is not required.⁵⁵ Rather it is sufficient to find a wrongful act done intentionally, which necessarily results in harm and is without just cause or excuse.⁵⁶

C. Examination of the Eighth Circuit

The Eighth Circuit, in deciding two prior cases under section 523(a)(6), has aligned itself with those courts which interpret the statute strictly.⁵⁷ In *In re Long*⁵⁸ the court held dischargeable a conversion of borrowed funds because there was no proof the debtor

1263 (11th Cir. 1988) ("malice for purposes of § 523(a)(6) can be established by a finding of implied or constructive malice").

51. *Supra* note 45. See also *In re Quezada*, 718 F.2d 121, 122 (5th Cir. 1983), *cert. denied sub nom. Kelt v. Quezada*, 467 U.S. 1217 (1984) (negligence in permitting pit bull to cause injury did not constitute willful infliction of injury and therefore the debt was dischargeable).

52. *In re Kimzey*, 761 F.2d 421, 424 (7th Cir. 1985) (narrow construction of the statute is required to effectuate the policy of permitting bankrupts a fresh start, and a mere finding of an intentional conversion does not meet the requirement of finding both willfulness and malice).

53. This looser interpretation of section 523(a)(6) is well-exemplified by *United Bank of Southgate v. Nelson*, 35 Bankr. 766, 768-70 (Bankr. N.D. Ill. 1983), which surveys the history of the "willful and malicious injury" exception.

54. *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1263 (11th Cir. 1988), *see supra* note 50; *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1009-10 (4th Cir. 1985) (implied malice was enough to make debtor's liability nondischargeable), *see supra* note 48.

55. *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986) ("maliciousness" is still controlled by *Tinker*, and it means "in conscious disregard of one's duties or without just cause or excuse; it does not require ill will or specific intent to do harm). *But see supra* note 49, *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985) (Congress' intent was to render *Tinker* obsolete).

56. *In re Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986) (this satisfies the "willful and malicious" standard, even without proof of a specific intent to injure). *But see supra* notes 48 and 49.

57. *See supra* notes 48-52 and accompanying text. The Missouri Bankruptcy Court, which heard *Hartley* de novo, noted in its opinion that "the Court [sic] is highly cognizant of the extremely heavy burden that the Eighth Circuit has placed on proponents of § 523(a)(6) claims." *In re Hartley*, 75 Bankr. 165, 166 (Bankr. W.D. Mo. 1987) *aff'd* 100 Bankr. 477 (W.D. Mo. 1988), *rev'd*, 869 F.2d 394 (8th Cir.), *aff'd on reh'g en banc*, 874 F.2d 1254 (8th Cir. 1989).

58. 774 F.2d 875 (8th Cir. 1985).

had committed the act with a malicious intent or the expectation of harming the creditor's economic interests.⁵⁹ The court found that to bar discharge *both* willfulness and malice must be shown, that the former means intentional or deliberate, and that the latter requires "conduct more culpable than that which is in reckless disregard of the creditor's economic interests and expectancies."⁶⁰

In *Cassidy v. Minihan*⁶¹ the court held dischargeable under section 523(a)(6) a judgment for injuries suffered in an automobile accident caused by a drunken driver.⁶² The court found the prevailing view allowed discharge "absent a showing that the debtor acted with intent to inflict injury."⁶³ The court concluded such a view was also the intent of Congress.⁶⁴ As the debtor's conduct at worst amounted to reckless disregard, the debt was dischargeable.⁶⁵

III. ELEMENTS OF THE LAW

In determining whether an injury comes within the scope of section 523(a)(6) courts generally look behind the judgment to determine the nature of the action.⁶⁶ Judgments for assault and battery are presumed to be for "willful and malicious" injury unless the actual nature of the defendant's liability is negligence and not an intentional assault or battery.⁶⁷ In addition, the express language of the

59. *Id.* at 881–82. The court said that the debtor's knowledge that he was violating the creditor's *legal* rights is insufficient to establish malice; some additional "aggravated circumstances" would need to be shown under the formulation of *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934).

60. *Id.* at 880–81. The court approved of the use of the RESTATEMENT (SECOND) OF TORTS § 8A comment b (1965) as a requirement for the bar to discharge (as the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness), saying the expected harm must be "'certain or substantially certain' to occur." *Id.* at 881. However, intent also may be measured in an objective sense. *Id.*

61. 794 F.2d 340 (8th Cir. 1986).

62. *Id.* at 344. This accident occurred before Congress in 1984 added to the list of exceptions to discharge section 523(a)(9) relating to debts arising out of accidents caused by drunk drivers.

63. *Id.* at 343. The court cited for support *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985), *see supra* note 49.

64. *Id.* at 343–44.

65. *Id.* at 344.

66. *See* 9A AM. JUR. 2D *Bankruptcy* § 805 (1980). *See also* *Greenfield v. Tuccillo*, 129 F.2d 854, 856 (2d Cir. 1942) (form of judgment itself does not control, and resort to entire record may be had to determine dischargeability). *But see* *Peters v. United States*, 177 F. 885, 888 (7th Cir.), *cert. denied*, 217 U.S. 606 (1910).

67. *See* Annotation, *supra* note 9, at § 10. *See In re Garland*, 401 F. Supp. 608, 610 (E.D. Pa. 1975) (there was no evidence indicating willfulness and maliciousness of assault and battery); *Globe Indemnity Co. v. Granskov*, 246 Wis. 87, 91, 16 N.W.2d 437, 439 (1944) (bankrupt sheriff was merely negligent in failing to protect prisoner

Code,⁶⁸ and the public policy purpose underlying it, are considered.⁶⁹

The elements to be considered under section 523(a)(6) are basically those which constitute an intentional tort: (1) an intentional act by the debtor; (2) done with intent to harm or with reckless disregard of others' rights or without just cause or excuse; (3) which causes an injury to the creditor; and (4) which is the proximate result of the debtor's act.⁷⁰ It is nearly always the second element which proves to be the issue: did the debtor act with a *malicious intent*?

IV. *IN RE HARTLEY*

Hartley arose out of the circumstances surrounding an employer-employee relationship.⁷¹ Rickey Jones was working in the unventilated basement of an auto parts and tire service co-owned by James Hartley.⁷² At the direction of Hartley, Jones was cleaning and painting tires with a gasoline mixture. The accumulation of fumes made the job barely tolerable.⁷³ Aware of all the circumstances, and as a "joke" on Jones, Hartley intentionally threw a lighted firecracker into the basement.⁷⁴ Hartley intended only to "startle" Jones; in-

from ensuing bodily attack by another, as sheriff did not act willfully and maliciously in failing to protect).

68. 11 U.S.C. § 523(a)(6) (1988).

69. See, e.g., *In re Kimzey*, 761 F.2d 421, 424 (7th Cir. 1985) (the section 523(a)(6) exception is "narrowly construed, however, in order to effectuate the Congressional policy of permitting bankrupts a fresh start"). But see, e.g., *In re Cecchini*, 780 F.2d 1440, 1442 (9th Cir. 1986) (application of a "looser standard" under section 523(a)(6) would "uphold the bankruptcy policy of discharging the debts of honest debtors," not all debtors regardless of merit (emphasis added)).

70. T. SALERNO, *BANKRUPTCY LITIGATION AND PRACTICE: A PRACTITIONER'S GUIDE* 2D ED. 577-78 (1986).

71. 869 F.2d at 394-95. Four decisions have been rendered in the bankruptcy case of James Lee Hartley: *In re Hartley*, 75 Bankr. 165 (Bankr. W.D. Mo. 1987) (bankruptcy court held debt nondischargeable, and debtor appealed). *In re Hartley*, 100 Bankr. 477 (W.D. Mo. 1988) (district court held debt nondischargeable, and debtor appealed). *In re Hartley*, 869 F.2d 394 (8th Cir. 1989) (three-judge panel reversed district court, holding debt dischargeable, and creditor appealed). *In re Hartley*, 874 F.2d 1255 (8th Cir. 1989) (in rehearing en banc, the Eighth Circuit divided five to five, thereby vacating the decision of the Eighth Circuit Appellate Panel and reaffirming the judgment of the district court that debt was nondischargeable).

72. *In re Hartley*, 869 F.2d at 394-95.

73. *In re Hartley*, 100 Bankr. at 478. Another employee had been performing the task before Jones, but this employee quit the task due to the fumes and the smell. Jones volunteered to take his place. Due to the conditions Jones from time to time emerged to "get some air."

74. *Id.* Hartley testified that such "jokes" were commonplace, and that he and others had thrown firecrackers at one another "maybe a hundred" times over the years.

stead the gasoline fumes ignited.⁷⁵ In the ensuing conflagration Jones suffered burns over 29% of his body, including permanent scarring and disfigurement to his arms, neck, and face.⁷⁶

Jones filed a personal injury suit against Hartley in a Missouri circuit court.⁷⁷ Before the action went to trial Hartley filed a Chapter 7 bankruptcy petition for the sole purpose of eliminating the potential tort liability to Jones.⁷⁸ Jones contested the discharge, arguing that the claim arose from a "willful and malicious injury by the debtor," and was therefore barred from discharge by 11 U.S.C. § 523(a)(6).⁷⁹

After consideration by four courts the debt was held to be nondischargeable.⁸⁰ Both the district court decision, which was ultimately affirmed (holding the debt to be nondischargeable), and the vacated decision of the Eighth Circuit Court three-judge panel (holding the debt to be dischargeable), will be analyzed below.⁸¹

A. District Court Decision: Debt Nondischargeable

The district court found the sole legal issue to be whether the injury was malicious within the meaning of section 523(a)(6), since Hartley admittedly threw the firecracker intentionally.⁸² Curiously, none of the four courts stated what Jones' underlying personal injury suit was based upon; if Hartley was not found liable of an intentional

75. *In re Hartley*, 75 Bankr. at 166. Hartley meant only to startle or scare Jones, and Hartley characterized his act as "horseplay."

76. *Id.*

77. *Id.* Though Jones was injured while he was in the employ of Shade Tree Auto Parts and Tire Service, his cause of action in tort was not barred by a workers' compensation act. The Missouri Workers' Compensation Law exempts from its provisions employers which have no more than four employees, Mo. ANN. STAT. § 287.090, subd. 1. (2) (Vernon Supp. 1990), and Shade Tree was exempt on this basis (according to Jones' counsel).

78. *In re Hartley*, 75 Bankr. at 166. Hartley's only other debts were about \$16,000 in secured debts and under \$15,000 in unsecured debts. *Id.* Hartley and his wife had monthly take-home pay of roughly \$2,000. *Id.* The bankruptcy court concluded that the bankruptcy was filed "for no other purpose" than to eliminate the liability from the looming tort judgment the creditor was pursuing. *Id.*

79. *In re Hartley*, 100 Bankr. at 478.

80. See *supra* note 71.

81. In the *Hartley* case the Eighth Circuit, sitting en banc rendered no opinion, as the court was equally divided and thus reached no decision. *In re Hartley*, 874 F.2d 1254 (8th Cir. 1989). Therefore the district court's decision was affirmed. *Id.* (The last decision on appeal, by the Eighth Circuit panel, was vacated upon the granting of Jones' petition for rehearing en banc. *Id.* Therefore the Eighth Circuit was reviewing the district court decision en banc.) The district court and panel opinions have been selected here for analysis as being representative of each of the opposing five-judge factions on the Eighth Circuit.

82. *In re Hartley*, 100 Bankr. at 479. The Eighth Circuit had previously held that the "willful" and "malicious" standards must *both* be met, as the statute presents them in the conjunctive. *In re Long*, 774 F.2d 875, 880-81 (8th Cir. 1985).

tort this fact would prove dispositive under prior Eighth Circuit rulings.⁸³

The district court noted that the required "malicious" intentional harm could be shown in either of two ways.⁸⁴ First, the creditor could prove the debtor subjectively intended for the harmful consequences to follow.⁸⁵ Alternatively, the creditor would merely have to prove that, given the debtor's act, the resulting injury to the creditor would be substantially ("largely, but not wholly") certain to result.⁸⁶

The district court borrowed this standard of intent to harm from Prosser's minimum standard of intent to find liability for an intentional tort. Prosser states that "where a *reasonable man in the defendant's position* would believe that a particular result was substantially certain to follow, he will be dealt with as though he had intended it."⁸⁷

The district court applied the Prosser "reasonable man" standard to the facts of *Hartley* to determine the outcome of the sole legal issue in the case.⁸⁸ The court reasoned that throwing a lighted firecracker into a room known to be filled with gasoline fumes "is substantially certain to cause an explosion and that a reasonable man would recognize that fact."⁸⁹ Therefore, it concluded, the debtor maliciously intended the harm which resulted to the creditor, and the debt is nondischargeable. As the court succinctly stated: "[t]here are

83. As the *Hartley* district court noted, the Eighth Circuit had previously held that only debts arising from intentional *injuries* were nondischargeable. Injuries arising from mere wanton or reckless conduct are dischargeable. *In re Hartley*, 100 Bankr. at 479 (citing *Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir. 1986)). See also *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985) (Section 523(a)(6) malice applies "only to conduct more culpable than that which is in reckless disregard . . ."). These two cases constitute the two section 523(a)(6) cases decided by the Eighth Circuit before *Hartley*.

84. *In re Hartley*, 100 Bankr. at 479.

85. *Id.* Because this determination of another's subjective state of mind would put upon the courts a nearly impossible expectation, a second method of determining malicious intent was proffered. *Id.* See also *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1009-10 (4th Cir. 1985); *supra* note 48.

86. *In re Hartley*, 100 Bankr. at 479. The district court's definition of "substantially certain" was taken from WEBSTER'S NEW COLLEGIATE DICTIONARY 1153 (1979): "largely, but not wholly" certain. *In re Hartley*, 100 Bankr. at 479-80.

87. *In re Hartley*, 100 Bankr. at 479 (emphasis added by the court), citing W. PROSSER, LAW OF TORTS 32 (4th ed. 1971).

Only the district court utilized the Prosser "reasonable man" standard. The Eighth Circuit three-judge panel did not use this looser standard of intentional harm.

In a prior Eighth Circuit case, the court suggested that section 523(a)(6) malicious intentional harm could be determined based upon the standard expressed in RESTATEMENT (SECOND) OF TORTS § 8A comment b: the expected harm must be "certain, or substantially certain" to occur. *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985). The *Hartley* district court then loosened one step further the required standard for finding a malicious intent to injure—the Prosser "reasonable man" standard.

88. *In re Hartley*, 100 Bankr. at 480.

89. *Id.*

circumstances under which the law will not excuse a 'white heart and empty head'; this is one of those times."⁹⁰

B. Eighth Circuit Three-Judge Panel Decision: Debt Dischargeable

The Eighth Circuit three-judge panel found the legal issue to be whether the *injury* suffered by the creditor was *intentionally* inflicted by the debtor.⁹¹ In summarizing the arguments of both debtor and creditor, the court made clear that whether the debtor's act was intentional was not the dispositive issue.⁹² The debtor argued the debt was dischargeable because he did not intend to injure the creditor when he intentionally threw the firecracker.⁹³ The creditor argued the debt was nondischargeable claiming that, upon the intentional throwing of the firecracker at the creditor, the debtor became responsible for all the foreseeable consequences resulting from the willful act.⁹⁴

The court declared that while creditor "Jones' argument is a proper analysis for tort liability . . . , the tort standard of liability is not the same as the standard used to determine whether a debt is nondischargeable under section 523(a)(6)."⁹⁵ Thus it is clear that even a bona fide intentionally tortious act, which results in physical injury, does not in and of itself rise to the level of a "willful and malicious injury."⁹⁶ The previous two section 523(a)(6) cases decided by the Eighth Circuit⁹⁷ were found to support the rule that, to preclude discharge, the debtor must have acted intending to harm

90. *Id.* This pithy aphorism is highly revealing of the court's unstated standard for "malicious injury." A "white heart" connotes an utter lack of malicious intent; an "empty head" connotes not an intentional lack of due care but rather negligence. Thus, despite the language the court used, it must be concluded that Hartley's debt was held nondischargeable not on the basis of malicious intent to injure but on the basis of reckless disregard. See *supra* note 83 for proof of the district court's own inconsistency and failure to follow Eighth Circuit precedent.

91. *In re Hartley*, 869 F.2d 394, 395 (8th Cir. 1989). "As the statute was written by Congress, it is the injury to the creditor which must have been intentional—not the action of the debtor which caused the accident." *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Thus the creditor was claiming a strict intentional tort standard for dischargeability.

95. *Id.* The court cited as support for this interpretation the Report of the House Judiciary Committee, which overruled the *Tinker* standard of "reckless disregard" as being sufficient for a finding of "willful and malicious injury" under section 523(a)(6). See *supra* notes 45–56 and accompanying text.

96. What the court is doing here goes well beyond looking behind the judgment to ensure that the actual nature of the debtor's liability is not mere negligence, see *supra* notes 66–67 and accompanying text. Rather the court is saying that a mere intentional tort judgment, standing alone, is not enough to find nondischargeability. In order to bar discharge "aggravated circumstances" must also be present.

97. See *supra* notes 57–61 and accompanying text.

the "interests" of the creditor.⁹⁸ Accordingly, the Eighth Circuit three-judge panel held that, "[i]n the instant case there is simply no proof that Hartley threw the firecracker into the basement intending to cause the explosion and fire that injured Jones."⁹⁹ Therefore the court held the debt dischargeable.¹⁰⁰

The creditor then appealed the ruling. On a rehearing en banc the Eighth Circuit deadlocked five to five on the issue, thereby reaffirming the district court's decision of nondischargeability.¹⁰¹

V. ANALYSIS OF THE COURTS' DECISIONS

Both the district court and Eighth Circuit panel decisions took liberties interpreting prior Eighth Circuit case law to find support for their respective holdings under section 523(a)(6). The divergent holdings, though citing the same two precedents, can partially be explained in that *Hartley* was a case of first impression within the circuit. It presented both a possible intentional tort (assault and/or battery) by the debtor and resultant physical harm to the creditor.¹⁰² Such a combination of factors clearly may color the application of a standard which has been interpreted as variably as section 523(a)(6).¹⁰³

Despite the language used, the district court effectively employs something akin to a "reckless disregard" standard of dischargeability.¹⁰⁴ Recognizing that subjective intent to harm would

98. See *In re Hartley*, 869 F.2d at 395. This standard is extreme, and clearly goes beyond the standard which the Eighth Circuit precedents required for a finding of "willful and malicious injury." In *In re Long*, 774 F.2d 875 (8th Cir. 1985), the Eighth Circuit approved of using a tort definition of intent to determine if the debt was dischargeable, and also found proof of intent permissible in an objective sense.

99. *In re Hartley*, 869 F.2d at 395.

100. *Id.*

101. *In re Hartley*, 874 F.2d at 1254 (8th Cir. 1989).

102. See 869 F.2d at 396 (in dissent Judge Bowman argues that Hartley's deliberate act "clearly amounted to an assault upon Jones").

Neither of the prior Eighth Circuit cases concerned a fact situation which reasonably could have supported a judgment for an *intentional* tort and in which the tortious act caused serious physical injuries to the creditor. In *In re Long*, 774 F.2d 875, 882 (8th Cir. 1985), it was held that a debtor's willful breaking of a security agreement with a corporate creditor did not constitute a nondischargeable malicious conversion. In *Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir. 1986), it was held that a judgment for injuries suffered by the creditor from an automobile accident caused by the debtor drunk driver was dischargeable under section 523(a)(6). The accident preceded the 1984 passage by Congress of section 523(a)(9), which precludes discharge of debts arising "as a result of the debtor's operation of a motor vehicle while legally intoxicated," so the creditor pursued his claim under section 523(a)(6). Thus in *Long* the court faced an intentional tort (conversion) but no physical injuries, while in *Cassidy* the court faced negligence but with physical injuries to the creditor.

103. See *supra* notes 44-47 and accompanying text on how the confusion surrounding section 523(a)(6) has led to a split of authority among the courts.

104. See *supra* notes 88-90 and accompanying text.

be nearly impossible to prove,¹⁰⁵ the court permits, in the alternative, proof of the “likelihood of harm in an objective sense.”¹⁰⁶ The district court thereby arrives at the old standard of “constructive malice,” which was expressly overruled by Congress in its comment on *Tinker*.¹⁰⁷ On the other hand, the Eighth Circuit three-judge panel concluded that it must be proven that the debtor (subjectively) intended to injure the creditor;¹⁰⁸ proof of liability for a bona fide intentional tort is not by itself enough to make a debt nondischargeable.¹⁰⁹

Congressional intent makes both of these interpretations appear wide of the mark. Before 1978 it was a well-settled proposition that the *Tinker* reckless disregard/constructive malice standard was the operative definition of “willful and malicious.”¹¹⁰ There can be no doubt that Congress, in adopting the Bankruptcy Reform Act of 1978, intended to replace the *Tinker* “reckless disregard” standard with a heavier burden for the creditor to carry.¹¹¹ It appears that Congress, as a requirement for nondischargeability, has mandated a finding of something beyond proof of an intentional tort.¹¹²

The two prior Eighth Circuit decisions interpreting section 523(a)(6)¹¹³ indicate that where the court is faced with a fact situation in which mere ordinary negligence causes serious physical injuries, the debt will be found dischargeable. But where, as in *Hartley*, serious physical injuries are caused by recklessness¹¹⁴—by positive acts of commission rather than omission—or by attempted intentionally tortious acts, the court is divided. The court is torn between a rule which on its face mandates discharge in such situations, and a desire to financially compensate creditors who are physically injured by culpable, morally blameworthy debtors. Without resolution by

105. See *supra* note 48. *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1009–10 (4th Cir. 1985).

106. *In re Hartley*, 100 Bankr. at 479.

107. The *Tinker* standard for malice did not require a specific intent to harm. See *supra* text accompanying note 41. Instead, malice could be implied based upon the conduct of the debtor. See *supra* note 43 and accompanying text.

108. See *supra* notes 48–52 and accompanying text for accord with this position.

109. *In re Hartley*, 869 F.2d at 395.

110. See *supra* note 95.

111. See *supra* note 53.

112. See *supra* note 53. Based on the plain meaning of the words, courts which held no change occurred in the interpretation of the section 523(a)(6) “willful and malicious injury” language before and after 1978 simply disregarded Congress’ express intent to alter the status quo in some way.

113. See *supra* note 102.

114. “Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended.” BLACK’S LAW DICTIONARY 1142–43 (5th ed. 1979).

Congress the court will either have to apply the letter of the law—with its attendant harsh and unjust result for the creditor—or else reinterpret Congress' intent and make the debtor bear the burden of his act. If Hartley did commit an intentional tort, what does section 523(a)(6) require for a finding of nondischargeability? Following the express overruling of *Tinker* by Congress,¹¹⁵ it seems apparent that the intent and language of section 523(a)(6) now require something *beyond* merely that the tort be intentional.¹¹⁶ While this reading may lead to harsh results in *Hartley*-type situations, it does appear to be what Congress intended.¹¹⁷

The overarching policy of bankruptcy law is to provide to the "honest but unfortunate" debtor a fresh start.¹¹⁸ The ten types of debts listed in section 523(a) represent a policy judgment that these types of debts are not deserving of discharge under a Chapter 7 liquidation proceeding. To better achieve these policy goals, the following amendment of section 523(a)(6) is suggested. The Code ought to distinguish between debts arising from contract-based and tort-based claims. Where a breach of contract or property-type offense is at issue, the present willful and malicious injury standard ought apply.¹¹⁹ Unless the debtor intends malicious injury to the creditor, discharge will best achieve the policy goal of allowing *consumer* debtors a fresh start.¹²⁰ Where the creditor is an involuntary creditor, and has been physically injured by an intentional tort committed by the debtor, the public policy of denying Chapter 7 discharge via the section 523(a)(6) exception can best be achieved by adopting a straight tort standard for determining dischargeability.¹²¹

115. See *supra* notes 44–47 and accompanying text.

116. See *supra* notes 48–52 and accompanying text. But see *In re Hartley*, 869 F.2d 394, 396 n.1 (8th Cir. 1989) (Bowman, J. dissenting):

It seems to me that a claim for injury resulting from an assault, which is what we have here, should always be nondischargeable under § 523(a)(6). More broadly, I doubt that Congress intended that claims for injuries resulting from intentional torts should be dischargeable. Certainly, we should not lightly infer that Congress has created a safe haven in the Bankruptcy Code for intentional tortfeasors.

117. In addition to Congress' clear negation of the prior *Tinker* reckless disregard standard, Congress has not seen fit to remedy this situation in the 11 years since the Code has been in effect.

118. Rendleman, see *supra* note 33, at 723; *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

119. The reference here is to the more stringent standard, which requires a subjective intent by the debtor to harm the creditor.

120. See Rendleman, *supra* note 33, at 724–25. It is clear that modern bankruptcy laws are aimed at relieving *consumer* debtors, those who are debtors by virtue of unpayable contractual obligations acquired through extensions of credit. *Id.*

121. The Eighth Circuit three-judge panel stated that a tort standard of liability was *not* the proper standard for determining whether an act is willful and malicious so as to bar discharge under section 523(a)(6).

Non-contract based intentionally tortious acts would be nondischargeable while debts arising out of negligent acts would remain dischargeable.

VI. CHAPTER 13 DEBT ADJUSTMENT

Even if the Eighth Circuit Court of Appeals had found Hartley's debt to be nondischargeable under Chapter 7 pursuant to section 523(a)(6), Hartley still may not have had to make full payment on the debt. Provided a debtor like Hartley met maximum debt allowances, he simply could have converted his Chapter 7 liquidation into a Chapter 13 debt adjustment plan.¹²² His obligation would have been to pay all of his disposable income to his creditors for, at most, a period of five years.¹²³ Upon successful completion of the plan he then could have had his remaining debts automatically discharged, notwithstanding the bar of section 523(a)(6) for Chapter 7 bankruptcies.¹²⁴

A. Statutory Law—Operation of Chapter 13

With passage of the Bankruptcy Reform Act of 1978,¹²⁵ Congress created an alternative to the normal bankruptcy procedure of liquidation of the debtor's non-exempt assets.¹²⁶ Under this alternative, instead of liquidating assets, the debtor dedicates as much future disposable income as possible for a specified period of time to creditor repayment.¹²⁷ If the debtor has successfully completed the plan as proposed by the debtor and confirmed by the court,¹²⁸ then all debts provided for under the plan will be discharged, with only two exceptions.¹²⁹ The Chapter 13 alternative thus allows the debtor to both retain non-exempt assets and discharge remaining debts.¹³⁰

The purpose of allowing the debtor to choose Chapter 13 "debt adjustment" as an alternative to the normal Chapter 7 liquidation procedure is to give debtors an incentive to repay their debts.¹³¹ In enacting this alternative, Congress believed both debtor and creditor

122. 11 U.S.C. §§ 109(c) and 706 (1988).

123. Five years is the maximum statutory period of time for which the court may approve a Chapter 13 plan. 11 U.S.C. § 1322(c) (1988).

124. 11 U.S.C. § 1328(a) (1988).

125. See *supra* note 5.

126. Hughes, *Chapter 13's Potential for Abuse*, 58 N.C.L. REV. 831, 831 (1980).

127. *Id.* at 831-32.

128. See *infra* note 171 and accompanying text on the requirements for confirmation of a Chapter 13 plan.

129. 11 U.S.C. § 1328(a) (1988). The only two debts which are excepted from discharge under Chapter 13 are certain long-term debts and alimony, child support or maintenance. See also 11 U.S.C. §§ 1322(b)(5) and 523(a)(5).

130. See *BANKRUPTCY LAW REVISION*, *supra* note 33, at 118.

131. See Hughes, *supra* note 126, at 831.

would be better off under a debt repayment plan.¹³² The debtor is allowed to retain non-exempt assets, to better protect his credit rating, avoid the stigma attached to an ordinary liquidation bankruptcy proceeding, and to retain pride in being able to meet obligations.¹³³ The benefit to creditors is that they fare no worse under a Chapter 13 repayment plan, creditors fare no worse than under liquidation,¹³⁴ and likely they will fare significantly better.¹³⁵ Thus Congress created incentives for a debtor to elect Chapter 13.

One of the incentives was a more liberal discharge provision.¹³⁶ While ten types of debt are nondischargeable under Chapter 7, only two types of debt are nondischargeable under Chapter 13.¹³⁷ Shortly after the Code became effective one commentator concluded that this disparity was an oversight by Congress rather than a deliberate policy decision, and that this disparity created a great potential for debtors to abuse the purpose of Chapter 13.¹³⁸ While the more liberal discharge provision may be subject to abuse in some situations, the countervailing considerations also have merit.¹³⁹

The liberality of the Chapter 13 discharge provision might best be viewed as a concession to reality: the less incentive the Code gives the debtor to repay the creditor, the more likely the debtor will be to cease gainful employment or flee the jurisdiction.¹⁴⁰ Such a result

132. See BANKRUPTCY LAW REVISION, *supra* note 33, at 118.

133. *Id.*

134. See 11 U.S.C. § 1325(a)(4) (1988). In order to have the court confirm a Chapter 13 debt adjustment plan, this subsection requires that the unsecured creditors receive *at least* as much under the plan as they would have received under a Chapter 7 liquidation proceeding. *Id.*

135. See BANKRUPTCY LAW REVISION, *supra* note 33, at 118.

136. Congress indicated a preference for Chapter 13 for those who do utilize the bankruptcy laws: "The premises of the bill [the Bankruptcy Reform Act of 1978] with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under Chapter 13" *Id.*

137. Compare 11 U.S.C. § 523(a) (1988) with 11 U.S.C. § 1328(a) (1988). See *supra* note 129 for the two types of debts which can never be discharged in bankruptcy.

138. See Hughes, *supra* note 126, at 831, 843. Bankruptcy Judge Hughes (Bankr. N.D. Cal.) reached this conclusion based upon the legislative history of sections 523 and 1328(a). *Id.* The abuse which Judge Hughes feared was that a debtor with a section 523(a) debt nondischargeable under a Chapter 7 liquidation would skirt this bar to discharge by proceeding under Chapter 13 with a plan that would pay all creditors no more than they would have received under the Chapter 7 liquidation. *Id.* at 833-34. Under Chapter 13 the remaining unpaid portion of the section 523(a) debt would be discharged. 11 U.S.C. § 1128(a) (1988). Where this does occur it would seem to be an abuse of the spirit of the Code.

139. See *supra* notes 131-35 and accompanying text.

140. Recall that one of the rationales underlying the entire concept of bankruptcy is that the *public* is benefitted by rehabilitating a debtor to be a productive economic member of society. See *supra* note 34. To a large extent this rationale applies equally to the creditor. If the debtor has no incentive to work he probably will not, and the

leaves the creditor with only a Pyrrhic victory. One reading would be that Congress intended the Chapter 13 discharge as a carrot to lead the debtor to act—for the mutual benefit of debtor and creditor—by fulfilling his obligations to the extent he is able.¹⁴¹ Whether a given Chapter 13 plan abuses the purpose of the Code ultimately turns on how the Code is applied in that specific case.¹⁴²

B. *Examination of Jurisdictional Abuse Prohibitions*

The sole barrier to abuse of the broad Chapter 13 discharge is the Code's "good faith" requirement.¹⁴³ As one court has stated it, "the good faith requirement . . . is the only safety valve through which plans attempting to twist the law to malevolent ends may be cast out."¹⁴⁴ The good faith requirement has become the focal point of creditor challenges to confirmation of Chapter 13 plans. Good faith, however, is not defined in the Code.¹⁴⁵

To determine whether a Chapter 13 plan has been proposed in good faith, most courts have developed a "totality of the circumstances" test.¹⁴⁶ In *In re Rimgale*,¹⁴⁷ one of the earlier appellate decisions to rule on the good faith requirement, the Seventh Circuit Court of Appeals held that it was the duty of the court to evaluate good faith, and that good faith would have to be determined on a case-by-case basis.¹⁴⁸ This "scrutiny" of the plan was to be performed by the bankruptcy judge, who was to consider a number of factors which could bear on good faith.¹⁴⁹

creditor may then receive at best the liquidation value of the debtor's non-exempt assets, which value may well be a trifle.

141. See 5 COLLIER, *see supra* note 26, at § 1328.01[c] at 1328-5. See BANKRUPTCY LAW REVISION, *supra* note 33, at 118:

Chapter 13 . . . protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. *The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.*

Id. (emphasis added).

142. This in turn often comes down to the question of whether the Chapter 13 plan "has been proposed in good faith by the debtor." See *infra* note 174.

143. See *infra* note 171 for the seven requirements which the debtor must meet to have the court confirm his plan. The good faith requirement is the only non-quantifiable, subjective requirement of the seven, and thus is the only requirement which the courts can use to exercise discretion.

144. *In re Leal*, 7 Bankr. 245, 248 (Bankr. D. Colo. 1980).

145. See *infra* note 176 and accompanying text.

146. See 5 COLLIER, *supra* note 26, at § 1325.04[4] at 1325-18 n.45.

147. 669 F.2d 426 (7th Cir. 1982).

148. *Id.* at 431.

149. *Id.* The court cited with approval *In re Kull*, 12 Bankr. 654, 659 (Bankr. S.D.

The Ninth Circuit Court of Appeals in *In re Goeb*¹⁵⁰ stated that good faith must be determined "in the light of *all* militating factors."¹⁵¹ Influenced by a U.S. Supreme Court case stating that a "bankruptcy court is a court of equity and is guided by equitable doctrines and principles . . .,"¹⁵² the Ninth Circuit court held that the good faith inquiry depends upon whether the plan contained misrepresentations of fact, the debtor sought to unfairly manipulate the Code, or the plan was proposed in an inequitable manner.¹⁵³

The Fourth Circuit Court of Appeals in *Deans v. O'Donnell*¹⁵⁴ borrowed from each of these cases. There the court held that good faith must be determined by reference to "all militating factors," that "the totality of the circumstance must be examined on a case by case basis," and that a specific list of factors should be considered.¹⁵⁵ Later courts, including the Eighth Circuit, have followed the lead of these earlier courts in finding a standard for the statutory good faith requirement.¹⁵⁶

VII. EXAMINATION OF THE EIGHTH CIRCUIT STANDARD

The Eighth Circuit has decided two prior cases involving section 1325.¹⁵⁷ In *In re Estus*¹⁵⁸ the court reversed and remanded the district court's holding that a Chapter 13 plan which proposed to pay nothing and discharged a student loan met the statutory requirements for confirmation of the plan.¹⁵⁹ The court began by stating Congress' purpose in enacting Chapter 13 in 1978: to remedy the previously inadequate system of providing relief to bankrupt consumers, and to encourage more debtors to pay back their debts.¹⁶⁰

Ga. 1981), which listed twelve factors to be considered in the good faith determination.

150. 675 F.2d 1386 (9th Cir. 1982).

151. *Id.* at 1390 (emphasis in original).

152. *American United Mutual Ins. Co. v. City of Avon Park*, 311 U.S. 138, 145 (1940) (citations omitted).

153. *In re Goeb*, 675 F.2d at 1390.

154. 692 F.2d 968 (4th Cir. 1982).

155. *Id.* at 972.

156. *In re Estus*, 695 F.2d 311 (8th Cir. 1982) is also often cited by other courts for its adoption of a twelve-factor good faith test.

157. See *infra* notes 158 and 166.

158. 695 F.2d 311 (8th Cir. 1982).

159. *Id.* at 317.

160. *Id.* at 313. The court said:

Congress perceived that a major problem under the old bankruptcy law was the inadequacy of relief provided for consumer debtors. New Chapter 13 was enacted to provide an effective system for dealing with consumer bankruptcies and also to encourage more debtors to attempt to pay their debts under bankruptcy court supervision.

Id. (citation omitted).

The court added that Congress liberalized the Chapter 13 provisions by: ex-

The opinion then moved to the heart of the issue in Chapter 13 confirmation—good faith.

The court found that “[t]he good faith requirement demands a separate, independent determination . . . whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13.”¹⁶¹ Twelve factors were set out to be considered and weighed in analyzing the debtor’s good faith.¹⁶² In *Estus* the court applied several of the more salient factors in holding that the debtor’s plan was not proposed in good faith.¹⁶³

It was noted that the duration of the plan, at fifteen months, was shorter than the normal thirty-six month duration, that the debt sought to be discharged would be nondischargeable under a Chapter 7 proceeding, and that the plan ignored the debtor’s likely increase in future income.¹⁶⁴ *Estus* established a flexible, relatively objective approach to the determination of good faith.

panding the class of individuals eligible to use Chapter 13; eliminating the old requirement of approval of the debtor’s plan by a majority of unsecured creditors; expanding the scope of dischargeable debts by allowing discharge of all debts except alimony and child support, and certain long term debts; and by allowing the debtor to retain for himself some non-exempt assets, unlike a Chapter 7 proceeding. *Id.* at 313–14.

161. *Id.* at 316. The court first noted that Congress has not defined the term “good faith” as it is used in section 1325(a)(1). *Id.* at 314.

162. *Id.* at 317. The twelve factors, as follows, were not considered to be an exhaustive list:

[I]n addition to the percentage of repayment to unsecured creditors [which constitutes the twelfth factor], some of the factors that a court may find meaningful in making its determination of good faith are:

- (1) the amount of the proposed payments and the amount of the debtor’s surplus;
- (2) the debtor’s employment history, ability to earn and likelihood of future increases in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan’s statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and
- (11) the burden which the plan’s administration would place upon the trustee.

Id.

163. *Id.*

164. *Id.* The debt which would have been nondischargeable under Chapter 7 per section 523(a)(8) was an educational loan from the Veterans Administration. *Id.* at

In 1984 Congress amended section 1325 to require that, if an unsecured creditor objected to confirmation of the debtor's plan, the court could not approve the plan unless all of the debtor's projected disposable income for three years would be applied to make payments under the plan.¹⁶⁵ In *Education Assistance Corp. v. Zellner*¹⁶⁶ the Eighth Circuit ruled that this "ability to pay" criterion "subsumes most of the *Estus* factors," with the result that the good faith test now turns mainly on whether the debtor's plan was arrived at accurately and without fraud, misrepresentation, or unfair manipulation of the Bankruptcy Code.¹⁶⁷ In this case, the court held the debtor's plan to be proposed in good faith, finding that the debtor's income and expenses were accurate and that the plan was a serious attempt to repay the debt and not "an abuse of the bankruptcy laws."¹⁶⁸ If all disposable income for three years is committed to the plan, and the plan is calculated accurately, the Eighth Circuit will find the requisite good faith to confirm the plan.

An individual, proceeding in bankruptcy under Chapter 7, cannot discharge a debt arising from a willful and malicious injury.¹⁶⁹ Under Chapter 13 such a debt is dischargeable.¹⁷⁰ The court must confirm the debtor's proposed Chapter 13 plan if it satisfies seven prerequisites enumerated in section 1325.¹⁷¹ These provisions are

312. Debtor *Estus* was a federal employee, and thus a future income increase was apparently almost certain to occur within the length of the plan. *Id.* at 317.

165. 11 U.S.C. § 1325(b)(1)(B) (1988).

166. 827 F.2d 1222 (8th Cir. 1987).

167. *Id.* at 1227. The court stated that following the congressional amendment, the good faith inquiry, i.e.,

[W]hether the plan "constitutes an abuse of the provisions, purpose or spirit of Chapter 13," *Estus*, 695 F.2d at 316, [now] has a more narrow focus. The bankruptcy court must look at factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.

Id. The nebulous phrase "unfairly manipulated the Bankruptcy Code" is not defined in the opinion.

168. *Id.*

169. 11 U.S.C. §§ 727(b), 523(a)(6) (1988).

170. 5 COLLIER, *supra* note 26, at § 1328.01[1][c]. See also 11 U.S.C. § 1328(a) (1988). Under Chapter 13, Adjustment of Debts of an Individual With Regular Income, only two types of debts cannot be discharged. *Id.* The first exception to the complete discharge policy is for long-term debts—those "on which the last payment is due after the date on which the final payment under the [Chapter 13 payment] plan is due." *Id.* at § 1322(b)(5). The second exception is for any debt for alimony, maintenance, or support for a spouse or child. 11 U.S.C. § 523(a)(5) (1988).

171. W. DRAKE, JR., BANKRUPTCY PRACTICE § 13.15, at 13-43 (1989). If a creditor objects to confirmation of the plan, the debtor must meet another requirement to have the plan confirmed, which is included as the seventh requirement for confirmation. Drake discusses these requirements at 13-50. The seven requirements are:

§ 1325. Confirmation of plan

distinct, have clear standards, are easily applied, and are not frequently at issue.¹⁷² Most challenges to discharge and confirmation under a Chapter 13 plan occur when a debt is proposed for discharge which would not be dischargeable under Chapter 7.¹⁷³ Here the salient issue becomes whether “the plan has been proposed in good faith” by the debtor.¹⁷⁴

Courts have struggled with the “good faith” requirement of Chapter 13.¹⁷⁵ Congress has never defined the term,¹⁷⁶ and before 1978

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- (a) Except as provided in subsection (b), the court shall confirm a plan if—
 - (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
 - (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
 - (3) the plan has been proposed in good faith and not by any means forbidden by law;
 - (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
 - (5) with respect to each allowed secured claim provided for by the plan—
 - (A) the holder of such claim has accepted the plan;
 - (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder; and
 - (6) the debtor will be able to make all payments under the plan and to comply with the plan.
 - (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
 - (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
 - (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325 (1988).

172. Requirements (2), (4), and (6) of section 1328 and the seventh requirement, section 1325(b)(1), primarily require only mathematical calculations to ascertain whether they have been complied with. Requirement (1) merely requires that the plan be in compliance with the general provisions of the Code. See W. DRAKE, JR., *supra* note 171, at § 13.15 at 13-43. Requirement (5) pertains only to secured claims, and so is not at issue when the debtor is a tortfeasor. This leaves requirement (6) to be primarily at issue.

173. 5 COLLIER, *see supra* note 26, at § 1328.01[1][c] at 1328-4, 1328-5.

174. 11 U.S.C. § 1325(a)(3). See COLLIER, *supra* note 26, at 1328-5.

175. *In re Le Maire*, 883 F.2d 1373, 1377-78 (8th Cir. 1989).

176. *In re Estus*, 695 F.2d 311, 314 (8th Cir. 1982).

there was no case law interpreting the term as used in Chapter 13.¹⁷⁷ With the passage of Chapter 13 in 1978, the courts divided on whether good faith required that there be a minimum debt repayment for the plan to be confirmed.¹⁷⁸ Some courts held that good faith required substantial or meaningful payments to unsecured creditors,¹⁷⁹ while other courts held that no minimum level of payment was required.¹⁸⁰ In 1984 Congress made clear that no minimum level of payment was required.¹⁸¹ The appellate courts today are largely in agreement that Chapter 13 good faith now pertains to whether the debtor has accurately stated debts and expenses, whether any fraudulent misrepresentation has been made, or whether the Code is being unfairly manipulated by the debtor.¹⁸²

VIII. *IN RE LE MAIRE*

While the facts of the *Hartley* case suggest the debtor's act may have only risen to the level of a "negligent assault,"¹⁸³ in *In re Le Maire*¹⁸⁴ the debtor's act could only be characterized as a vicious assault. The opinion's recitation of the facts is riveting:

On July 9, 1978, at about noon, Handeen went to pick up his son and found Le Maire waiting for him. When Handeen got out of his car, Le Maire shot at him nine times with a bolt action rifle. The first two shots missed Handeen, but the third struck him on the left

177. "Section 1325(a)(3) is derived from Section 651 of the former Bankruptcy Act. There was no reported case law construing the good faith requirement under Section 651 of the Bankruptcy Act nor did the original legislative history of Section 1325(a)(3) specifically reveal its rationale." 5 COLLIER, *supra* note 26, at § 1325.04 at 1325-10.

178. See *infra* notes 179-180.

179. See, e.g., *In re Burrell*, 2 Bankr. 650, 652-53 (Bankr. N.D. Cal. 1980) (it is necessary to read such a substantial payment requirement into 11 U.S.C. § 1325(a) on the basis that failure to do so will frustrate the objectives of Congress and lead to absurd results), *rev'd*, 6 Bankr. 360 (Bankr. N.D. Cal. 1980); *In re Iacovoni*, 2 Bankr. 256, 268 (Bankr. C.D. Utah 1980).

180. See, e.g., *Barnes v. Whelan*, 689 F.2d 193, 198 (D.C. Cir. 1982) ("section 1325(a)(3) does not require any particular level of minimum repayment"); *In re Johnson*, 708 F.2d 865, 868 (2d Cir. 1983) ("courts should not read into the Act any per se limitations or requirements in respect to 'good faith' that Congress did not enact").

181. See The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984), adding to 11 U.S.C. § 1325 the present section (b). See *supra* note 171. This "ability to pay" provision has effectively eliminated the level of debtor payments as a consideration under the good faith requirement. 5 COLLIER, *supra* note 26, at § 1325.04[3] at 1325-17.

182. 5 COLLIER, *supra* note 26, § 1325.04[2] at 1325-17. The good faith test is also often phrased as "whether or not under the circumstances of the case there has been abuse of the provisions, purpose, or spirit of [Chapter 13] in the proposal . . ." *In re Terry*, 630 F.2d 634, 635 n.3 (8th Cir. 1980).

183. See *supra* note 9 for an explanation of the term "negligent assault."

184. 898 F.2d 1346.

side of his neck. Handeen then attempted to hide behind the car. Le Maire circled the car, shot at and missed Handeen twice more, and then hit him inside of his left knee. Le Maire circled again and Handeen jerked his head back to avoid the bullet at the time he thought Le Maire would pull the trigger of the rifle aimed at his head. Le Maire fired, and the bullet went through Handeen's right nostril, shattering the roof of his mouth and going through his tongue. Le Maire then fired a shot at Handeen's left arm. The bullet went through Handeen's arm and lodged on his spine. Le Maire fired a final shot through Handeen's ankle. In all, five of the nine shots fired by Le Maire struck Handeen. Le Maire declared that he had intended to kill Handeen.¹⁸⁵

Le Maire pled guilty to an aggravated assault charge. He received a prison term of one to ten years and actually served twenty-seven months of the term.¹⁸⁶ Le Maire was released from prison in 1981.¹⁸⁷ He returned to graduate school at the University of Minnesota and in 1986 received a Ph.D. degree.¹⁸⁸ Handeen then obtained a civil judgment against Le Maire for \$50,362.50, and attempted to collect via garnishment of Le Maire's wages.¹⁸⁹

Le Maire responded by filing a Chapter 13 proceeding.¹⁹⁰

185. *Id.* at 1347. A newspaper article reporting on Le Maire's criminal case expanded on the facts of the attack:

Gregory Le Maire, 25, . . . pled guilty to a charge of aggravated assault through a plea bargaining arrangement in which a charge of attempted murder was dismissed.

. . . .
Le Maire admitted he went to the home of Paul Handeen . . . July 9 [1978] waited for Handeen to arrive and then fired five shots at him with a .22 caliber rifle.

In sentencing him to Stillwater [state prison], [state district court Judge Sidney] Abramson told Le Maire, "But for the grace of you being a bad shot you are here for aggravated assault, not murder."

Le Maire told Abramson he thought shooting Handeen was the only way to bring about "justice."

Hours before the shooting, according to court records, Le Maire and his girlfriend learned they had been unsuccessful in getting a court to terminate Handeen's visitation rights involving a child he and his ex-wife had before their divorce. The child was in the custody of the mother.

[Judge Abramson stated that Le Maire] committed an "act that is as vicious an act that I have ever seen."

St. Paul Pioneer Press, Oct. 20, 1978, at 20, col. 1.

186. *Le Maire*, 898 F.2d at 1347.

187. *Id.*

188. *Id.* The degree was in experimental behavioral pharmacology. *Id.*

189. *Id.* Handeen obtained his civil judgment in September 1985. *Le Maire*, 883 F.2d at 1375. Le Maire entered into a consent judgment and paid \$3,000 of the amount owed. *Le Maire*, 898 F.2d at 1347. He then stopped paying, and Handeen began garnishment proceedings. *Id.*

190. *Id.* Le Maire filed bankruptcy in January 1987. While Hartley could have filed for bankruptcy under either Chapter 7 or 13, Le Maire could only file under Chapter 13 (in order to discharge his debt to Handeen) because per section 523(a)(6)

Handeen objected to confirmation of the plan on the ground that the plan was not proposed in good faith. Handeen argued that a debt nondischargeable by virtue of section 523(a)(6) in a Chapter 7 proceeding cannot be dischargeable in a Chapter 13 proceeding, and also that one who seeks to discharge a debt arising from criminal conduct can never do so in good faith.¹⁹¹ Handeen argued that allowing such a discharge would result in Chapter 13 becoming a "haven for criminal debtors" under which to discharge their related civil debts.¹⁹² Handeen argued in the alternative that Le Maire's Chapter 13 plan should not have been confirmed because it did not meet the statutory requirement of being proposed in good faith.¹⁹³

The Eighth Circuit Appellate Panel found the issue to be as stated above—whether the fact that this debt would be nondischargeable under Chapter 7 rendered it nondischargeable under Chapter 13.¹⁹⁴ Basing its holding on the history of the good faith requirement and the Eighth Circuit's previous interpretation of good faith, the panel found section 523(a)(6) to be no bar to the dischargeability of Handeen's judgment against Le Maire for the debtor's vicious assault.¹⁹⁵

The panel began its analysis by noting that the pertinent section of the Code itself, section 1328(a), precluded discharge for only two types of debts, neither of which was for a "willful and malicious injury."¹⁹⁶ Thus such a debt may be discharged if the debtor meets the six requirements of Chapter 13.¹⁹⁷ The panel stated that the Eighth Circuit's definition of good faith is cited in *Estus* and derived from Chapter 11 of the old Bankruptcy Act: "whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [the Chapter] in the proposal of the plan

debts for a "willful and malicious injury" cannot be discharged under Chapter 13. Wickham, *Chapter 7 or Chapter 13: Guiding Consumer Debtor Choice Under the Bankruptcy Reform Act*, 58 N.C.L. REV. 815, 821 (1980).

191. *Le Maire*, 883 F.2d at 1376, 1377. The bankruptcy court confirmed the plan and Handeen appealed. The district court affirmed the decision of the bankruptcy court. Handeen then appealed to the Eighth Circuit. The Eighth Circuit Appellate Panel affirmed the district court. *Le Maire*, 898 F.2d at 1347-48. The Eighth Circuit Court of Appeals then granted rehearing en banc, and on March 26, 1990, reversed the decision of the district court. The decision of the appellate panel was vacated. *Id.*

192. *Le Maire*, 883 F.2d at 1374-75.

193. *Le Maire*, 898 F.2d at 1348.

194. *Le Maire*, 883 F.2d at 1376. The court noted that it was undisputed that the debt would be nondischargeable under Chapter 7, as the debtor's act clearly arose out of a "willful and malicious injury" per section 523(a)(6). *Id.* Thus the case is one of first impression in the Eighth Circuit. *Id.* at 1376.

195. *Id.* at 1377, 1379.

196. *Id.* at 1377. See *supra* note 129 for the two types of debts which cannot be discharged under Chapter 13.

197. *Id.* at 1377. See *supra* note 171 for these requirements.

... ”¹⁹⁸ This good faith standard is to be determined by considering and weighing the twelve factors set out by the *Estus* court.¹⁹⁹

Finding that the bankruptcy court properly considered the *Estus* factors and found Le Maire's plan to be in good faith, the panel could not say that the decision was clearly erroneous, and thus the bankruptcy court's determination regarding good faith must stand.²⁰⁰ The bankruptcy court also considered the fresh start policy, which the Eighth Circuit termed “the cornerstone of bankruptcy law.”²⁰¹ Ultimately, in weighing the “competing equities” of the case, the panel accepted the finding of the bankruptcy judge²⁰² who concluded that Le Maire was sincere in his proposed plan of repayment, and was attempting to repay Handeen to the extent he was able.²⁰³

Finally, the panel disposed of the creditor's remaining objections to confirmation of the plan.²⁰⁴ The panel ratified the bankruptcy court's findings that the debtor: 1) was applying all of his disposable income to the plan;²⁰⁵ 2) that his inclusion of monthly rent to his parents of \$240 per month was a legitimate expense;²⁰⁶ 3) that the

198. *Id.* at 1378 (quoting *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1989), quoting *In re Deans*, 692 F.2d 968, 972 (4th Cir. 1982), quoting the old Bankruptcy Act, 11 U.S.C. § 766(4) (1976) (repealed)).

199. 883 F.2d at 1378. See *supra* note 162 for the twelve factors. *Estus* was decided in 1982, and in 1984 Congress clarified much of the confusion over the meaning of good faith when it amended Chapter 13 by adding new section 1325(b). See *supra* note 181 and accompanying text. While this Congressional action changed the interpretation of good faith in some circuits, the *Estus* twelve factors test remains good law. *Le Maire*, 883 F.2d at 1379.

200. *Id.* at 1379. The appellate court reviews findings of fact under a clearly erroneous standard. *Id.* The district court had affirmed the bankruptcy court's decision.

201. *Id.* at 1380. Regarding the debtor's fresh start in the instant case, the appellate court took note of the bankruptcy court's conclusion that “Le Maire, after serving his sentence, is getting back on his feet both professionally and financially.” *Id.*

202. The appellate court itself did not analyze Le Maire's good faith by applying the twelve *Estus* factors. Instead it relied upon and adopted the bankruptcy court's conclusions. *Id.* at 1379–80.

203. *Id.* at 1380. The bankruptcy judge stated, “I feel that he [the debtor] has made a whole hearted attempt to pay Handeen as much as he is able, which turns out to be a significant amount. Under these circumstances, I feel that his motivation is proper and his sincerity real.” *Id.* Under the plan as confirmed Handeen would receive 42.3 percent of the \$50,362 judgment against Le Maire. *Id.* at 1376.

204. *Id.* at 1380–81.

205. *Id.* at 1380. The bankruptcy court found that the debtor had approximately \$424 per month in disposable income, while under his plan he proposed to pay \$500 per month. *Id.* at 1376.

206. *Id.* at 1381. While Le Maire was in graduate school he paid no rent to his parents. *Id.* at 1380. Beginning in January 1987, the same month he filed his Chapter 13 bankruptcy petition, Le Maire's parents required that he pay rent or leave. *Id.* at 1380. Le Maire's original plan listed monthly rent of \$400, which his parents reduced to \$240 “to enable him to make more substantial payments on his bankruptcy

debtor's income from his university fellowship qualified as Chapter 13 "regular income";²⁰⁷ and 4) that the debtor's debt to his parents of \$3,600 for legal fees was not barred by either the six-year statute of limitations or the statute of frauds.²⁰⁸ The decisions of the bankruptcy and district courts confirming the plan were thereby upheld.²⁰⁹

The decision that the debtor's Chapter 13 plan was proposed in good faith should have been found clearly erroneous by the panel. Application of the *Estus* factors to the facts of the *Le Maire* case argue for this conclusion. Six of the factors appear salient here.²¹⁰ Two of these factors weigh in favor of the debtor. Under the plan, Handeen would receive 42.3% of the judgment owed him, which could be considered to be substantial repayment.²¹¹ Second, the duration of the plan as confirmed was for the statutory maximum of sixty months.²¹²

Four of these factors weigh in favor of the creditor. Regarding *Le Maire's* ability to earn and likely future increases in income, when Handeen won the civil judgment *Le Maire* held a Ph.D. degree, and at the time of the appellate court decision he was offered a position with an additional \$2,500 in salary.²¹³ His earning power from his advanced degree and the attendant raises one might expect from such a position do not appear to have been properly considered by

plan." *Id.* The bankruptcy court found no collusion regarding this matter. *Id.* at 1381.

207. *Id.* at 1381. One of the requirements to have a Chapter 13 plan confirmed is that the debtor's income be "sufficiently stable and regular to enable such individual to make payments under a plan . . ." 11 U.S.C. § 101(29) (1988). The bankruptcy court found that *Le Maire* qualified, as for the previous two years he had averaged \$16,000 from his position as a university fellow, and that "he has been offered a post-fellowship research position with a University scientist at a salary of \$18,500." 883 F.2d at 1381.

208. *Id.* The bankruptcy court found that debtor *Le Maire* had waived the six-year statute of limitations, that the statute had not yet begun to run (since the parents had never demanded payment), and that the Statute of Frauds did not apply since the relevant oral contracts could be performed within one year. *Id.*

209. *Id.*

210. Of the twelve *Estus* factors, five appear minor or less important in this case. See *supra* note 162 for factors (1), (5), (6), (8), (9), and (11). *Estus* factor (1) is "the amount of the proposed payments and the amount of the debtor's surplus." This factor has apparently been rendered moot by Congress' 1984 passage of the "ability-to-pay" provision of § 1325(b)(1), which requires that *all* the debtor's projected disposable income be applied to make payments under the plan. 11 U.S.C. § 1325(b)(1) (1988). Thus there can no longer be a debtor surplus.

211. Percentage of repayment is the first factor enunciated in *Estus*, see *supra* note 162 (it is not numbered as a factor by the court). See *supra* note 203 regarding *Le Maire's* repayment. While substantial repayment is no longer required, 5 COLLIER, see *supra* note 26, at § 1325.04[3] at 1325-17, many courts still consider it as one factor to be weighed.

212. 883 F.2d at 1376.

213. *Id.* at 1381.

the panel.²¹⁴

A second factor in Handeen's favor was that Le Maire's statement of debts and expenses presented many questions of accuracy, and appear to have been calculated to mislead the court.²¹⁵ The bankruptcy court disallowed two debts Le Maire contended were owed his parents, finding one to be a gift and the other to be mere use of property owned by his parents, not a purchase from, and debt to them.²¹⁶ Le Maire, who lived at his parents' residence, originally listed monthly rent of \$400 as an expense owed to his parents.²¹⁷ He had lived at his parents' residence for several years and had never before paid rent. Even though Le Maire first paid his parents rent the same month in which he filed bankruptcy,²¹⁸ the bankruptcy court found no collusion between Le Maire and his creditors-parents.²¹⁹ Finally, the bankruptcy court upheld as a loan the \$3,600 which Le Maire's parents had paid for his legal fees, but for which they had never requested payment.²²⁰ From this listing it appears that the debtor, in order to minimize his disposable income and to mislead the court, claimed every debt which the court might plausibly accept as an expense.

The third factor in Handeen's favor was that in making a good faith determination, Le Maire's debt to Handeen (as a "willful and malicious injury" under section 523(a)(6)) would not have been dischargeable had Le Maire been proceeding in bankruptcy under Chapter 7.²²¹ Lastly, and most importantly, the evidence indicates

214. The bankruptcy court found Le Maire's annual net income to be \$14,222.72 (\$1,185.24 times 12). *Id.* at 1376. This appears to be based upon the \$18,500 figure rather than the \$16,000 figure. However, given Le Maire's relatively strong earning power by virtue of an advanced degree in a technical field (experimental behavioral pharmacology) and the likelihood of rapid salary increases, it should be concluded that a payment plan based only on Le Maire's present earnings could greatly under-value his future disposable income.

215. See *supra* note 162 for *Estus* factor (4).

216. 883 F.2d at 1375. It appears to be no great coincidence that Le Maire's parents allowed him to live at home rent-free until January 1987, when he was requested to pay \$400 per month—the same month in which he filed bankruptcy. While Le Maire contended he owed a debt to his parents of \$3,050 for living and education expenses for the period 1971 to 1981, the court held this to be a gift by the parents. *Id.* While Le Maire also claimed that he owed his parents \$900 for the purchase of a car, the court found that the parents held title to the car and were merely allowing Le Maire to use it. *Id.*

217. *Id.* at 1380.

218. *Id.*

219. *Id.*

220. *Id.*

221. See, e.g., *In re Smith*, 848 F.2d 813, 821 (7th Cir. 1988) (bankruptcy court erred in failing to consider the circumstances in which debt arose and fact of nondischargeability under Chapter 7). See also 5 COLLIER, *supra* note 26, at § 1328.01[c] at 1328-5.

not that Le Maire was sincerely motivated to repay his debt to Handeen, but rather that he wanted to pay the bare minimum to Handeen to receive discharge of the debt.²²²

Le Maire's original Chapter 13 plan proposed paying \$175 per month for thirty-six months.²²³ He later submitted a modified plan proposing \$265 per month for thirty-six months, a 14% dividend to his creditors.²²⁴ The bankruptcy court rejected this plan, expressing "concern" over its deficiency.²²⁵ Le Maire responded with the present plan of \$500 per month for sixty months, a 42% dividend.²²⁶ This indicates that, by any measure, Le Maire did not act with the required good faith in the proposal of his Chapter 13 bankruptcy plan.²²⁷ Since the plan was not proposed in good faith, which is a violation of the spirit of the Code, it should not have been confirmed.

While the *Le Maire* panel properly considered that "the principle of fresh start . . . is the cornerstone of bankruptcy law,"²²⁸ countervailing concerns must also be heard. Dissenting in *Le Maire*, Judge Gibson gave voice to those concerns:

The court today is swayed by the bankruptcy court's concern with the debtor having to live the rest of his life with a significant judgment that would be inimical to a fresh start This leaves completely out of the equation the fact that the intentionally injured creditor has to live the rest of his life with the injuries inflicted and with the partial amount paid on the judgment as his only balm.²²⁹

222. See *supra* note 162 for factor (10).

223. *Le Maire*, 883 F.2d at 1375.

224. *Id.*

225. *Id.* at 1375-76. The bankruptcy court "concluded that Le Maire was not applying all of his disposable income to the plan and expressed concern about Le Maire's failure to propose a plan for the maximum statutory period of sixty months." *Id.* See 11 U.S.C. § 1322(c) (1988).

226. 883 F.2d at 1376.

227. On this basis *Le Maire* should have been found to have failed the *Estus* twelve-factor good faith test. The more generalized good faith test is whether "there has been an abuse of the provisions, purpose, or spirit of [the Chapter] in the proposal of the plan" *Id.* at 1378. *Le Maire*'s first two proposals are not consonant with the purpose or spirit of Chapter 13.

228. 883 F.2d at 1380.

229. *Id.* at 1382 (Gibson, J. dissenting). This is the factor which has been omitted from the Bankruptcy Code equation—the *involuntary* creditor who is an *intentionally physically injured tort* victim. Two of these factors in particular distinguish the *Hartley* and *Le Maire* situations from the typical contract-based debt situation. First, these two creditors are involuntary creditors; they never entered into a contractual agreement with the debtor based upon an assessment of the debtors' creditworthiness. Second, they suffered serious physical injuries, not mere pecuniary harm, as a result of the debtors' acts.

IX. THE EN BANC DECISION

These concerns became the rationale of the majority in the en banc decision.²³⁰ The entire Eighth Circuit Court of Appeals held that Le Maire's plan should not have been confirmed, contrary to the holdings of the bankruptcy court, the district court, and the Eighth Circuit panel.²³¹ The court entertained two arguments by Handeen. First Handeen asserted that debts arising out of criminal acts cannot be discharged in bankruptcy. Second, Handeen argued that Le Maire did not propose his Chapter 13 plan in good faith.²³² The court rejected the former argument, but held in favor of Handeen on the latter.²³³

The court focused its analysis on two of the *Estus* factors traditionally used to determine good faith: 1) whether the debt would be non-dischargeable in Chapter 7; and 2) what was the debtor's motivation in seeking Chapter 13 relief.²³⁴ The court stated that the issue of nondischargeability under Chapter 7 "is closely linked to the debtor's motivation and sincerity."²³⁵ It therefore proceeded to analyze good faith based upon Le Maire's motivation and sincerity in filing bankruptcy.²³⁶ The court found that the bankruptcy court had failed to give proper weight to "the strong public policy factors, inherent in the Bankruptcy Code," which militate against discharge of this particular debt.²³⁷ The court said the bankruptcy court gave "undue emphasis" to the lack of a statutory exception from discharge for debts resulting from willful and malicious injury.²³⁸ It then analyzed four primary facts which manifested a lack of good faith and an attempt to unfairly manipulate the Bankruptcy Code.²³⁹

Two of the matters which initially concerned the court were *pre-filing* actions by Le Maire.²⁴⁰ The first was that Le Maire intended to,

230. In the panel decision, decided by a two-to-one vote, Judge Magill wrote for the majority, and Judge Gibson wrote the dissent. *Le Maire*, 883 F.2d at 1374, 1382. In the en banc decision their positions were reversed. Judge Gibson wrote the majority opinion and Judge Magill wrote the well-reasoned dissent. *Le Maire*, 898 F.2d at 1347, 1353.

231. *Id.* at 1347-48.

232. *Id.* at 1348.

233. *Id.* at 1348, 1353.

234. *Id.* at 1350.

235. *Id.*

236. *Id.*

237. *Id.* at 1351.

238. *Id.*

239. *Id.* The court notes that lack of good faith is evidenced by a plan which "constitutes an abuse of the provisions, purpose or spirit of Chapter 13." *Id.* The Eighth Circuit chastised the bankruptcy court for altogether failing to address the issue of whether Le Maire tried unfairly to manipulate the Code. *Id.* at 1351 n.7.

240. *Id.* at 1351. The court erroneously states that pre-filing conduct may be considered in the good faith determination. *Id.* at 1352. In addition, 11 U.S.C. § 1325

and nearly succeeded in, killing Handeen.²⁴¹ Second, Le Maire sought to discharge the ensuing debt in bankruptcy after Handeen had taken legal action to collect it.²⁴² The court was also "troubled" by the validity of the debts which Le Maire claimed to owe his parents. The court, however, did not base its decision on this ground.²⁴³ Finally, the court considered that Le Maire failed to include a contingent \$30,000 to \$50,000 debt in his Chapter 13 plan.²⁴⁴ These four facts supplied the court with a basis for its holding.

The court held that Le Maire lacked the requisite good faith to be entitled to confirmation. However, the court limited its holding by cautioning that its decision "should not be read as a broad declaration extending beyond the facts before us."²⁴⁵ In coming to this conclusion, the court first applied what it considered to be the respective strengths of the public policies promoted by *not* allowing discharge of the section 523(a) debts.²⁴⁶ The court concluded that "there is a particularly strong policy prohibiting the discharge of a debt resulting from willful and malicious injury following an attempted murder."²⁴⁷ The court recognized that Congress purposefully expanded the scope of the discharge under Chapter 13 to encourage more debtors to repay their debts.²⁴⁸ But the court be-

(1988) sets out the requirements for court confirmation of a Chapter 13 plan. None of these requirements allow the court to take into consideration the pre-filing conduct or actions of the debtor, as Chapter 13 is intended to be highly remedial in nature.

241. *Id.* at 1351.

242. *Id.*

243. *Id.* at n.6. Le Maire signed a \$12,722 promissory note to his parents one day before filing his bankruptcy petition, and he never made any payments to them on the existing debt although he had income. This fact and the other suspicious circumstances surrounding the debts owed to his parents should have been a "red flag" to the court that the debtor was manipulating creditor repayment in bad faith. *Id.*

244. *Id.* at 1351. The debt owed to the U.S. Public Health Service would be forgiven contingent upon Le Maire's continuation of his employment in a post-fellowship research position at the University of Minnesota. *Id.* at 1358-59 (Magill, J. dissenting). Le Maire, however, intended to continue his employment. *Id.* at 1359.

245. *Id.* at 1353. The Eighth Circuit does not clarify whether only debts arising out of an attempted murder will be held nondischargeable under Chapter 13, or whether some unspecified lesser tortious conduct may suffice for finding a lack of good faith on the part of the debtor.

246. *Id.* at 1352. The Eighth Circuit noted that the bankruptcy court was correct in stating that the section 523(a)(6) exceptions to discharge do not "*expressly* apply to a Chapter 13 petition." *Id.* (emphasis added). The bankruptcy court's error was in not examining what public policies *were* served by barring discharge of section 523(a) debts. *Id.*

247. *Id.* at 1353.

248. *Id.* (citing *In re Estus*, 695 F.2d 311, 313 (8th Cir. 1982)). The court quoted a U.S. House of Representatives Report which stated that the broader discharge allowed under Chapter 13 "should furnish a greater incentive for the debtor to per-

lieved that the same public policies that justified an exception to the nondischargeability of a willful and malicious injury under Chapter 7 were also implicated in “*this particular Chapter 13 case.*”²⁴⁹

X. ANALYSIS OF THE EN BANC DECISION

The court’s refusal to confirm Le Maire’s Chapter 13 plan was a just result. Given the debtor’s conduct in arguably manipulating creditor repayment, Le Maire evidenced a lack of good faith in the proposal of his plan.²⁵⁰ Yet, although the court arrived at an equitable result, it did so by way of an inherently flawed analysis.

The court begins by correctly rejecting Handeen’s contention that as a matter of law a civil judgment cannot be discharged in bankruptcy if it arose from a criminal act.²⁵¹ Section 1328(a) excepts from discharge only two kinds of debts; the willful and malicious injury exception is not one of them.²⁵² The court also correctly noted that Congress purposefully broadened the Chapter 13 discharge provision significantly beyond that allowed in Chapter 7. The intent was to induce more consumer debtors to repay creditors to the extent possible from their post-petition disposable income.²⁵³ The court’s conclusion that section 523(a)(6) does not apply to Chapter 13 cases was proper.²⁵⁴

The court reduced to a footnote its consideration of whether the circumstances of Le Maire’s alleged debts to his parents evidenced a lack of good faith.²⁵⁵ While the court was “troubled” by a number of the irregularities, it decided not to closely review the bankruptcy court’s finding of good faith with regard to the debts.²⁵⁶ The court’s refusal to scrutinize these debts, however, was improper for two reasons. First, the facts before the court presented ample opportunity for finding that the debtor was attempting to mislead the bankruptcy

form under the [Chapter 13] plan.” *Id.* (citing H.R. REP. NO. 98, 95th Cong., 2d Sess. 129, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6090).

249. *Le Maire*, 898 F.2d at 1353 (emphasis added).

250. *Id.* at 1351 n.6. Two facts support the conclusion that Le Maire did not propose his plan in good faith. First, the totality of the circumstances surrounding his alleged debts to his parents make it unlikely that these were legitimate debts. The court was justifiably “troubled” about this. Second, Le Maire’s second plan was rejected by the bankruptcy court for failing to apply all disposable income to the plan, which evidences a lack of good faith.

251. *Id.* at 1348.

252. *See id.* at n.2.

253. *Le Maire*, 898 F.2d at 1353. *See* H.R. REP. NO. 595, 95th Cong., 2d Sess. 122, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6082–84.

254. *Le Maire*, 898 F.2d at 1348. *See also* 11 U.S.C. § 1328(a) (1988).

255. *Id.* at 1351 n.6.

256. *Id.* The court found other grounds upon which to find the lower court’s holding clearly erroneous. *Id.*

court and manipulate the Bankruptcy Code.²⁵⁷ Second, under existing precedent, the fact of debtor misconduct in the *proposal* of his plan is the only ground upon which a finding of lack of good faith can be based under Chapter 13.²⁵⁸

While the court was especially conservative in refusing to analyze Le Maire's debts to his parents, it over compensated in its consideration of his pre-petition conduct. Both the literal language and the public policy supporting Chapter 13 mandate the consideration of a debtor's conduct only from the point of filing bankruptcy.²⁵⁹ The dissent recognizes this analysis and emphasizes that section 1325(a)(3) "requires that the plan be '*proposed* in good faith' . . . , not that the debt was incurred in good faith."²⁶⁰ Yet the court improperly takes into consideration both the fact that Le Maire committed a heinous willful and malicious injury and that he filed bankruptcy only when Handeen tried to collect his judgment.²⁶¹

Most significant was the court's improper consideration of "public policy" as the major ground for its holding that Le Maire's plan should not have been confirmed.²⁶² Handeen contended that a civil liability resulting from a criminal act could never be discharged in bankruptcy, and the court correctly rejected this contention.²⁶³ By

257. The Eighth Circuit failed to employ its own good faith test. See *id.* at 1349 for the *Estus* good faith test.

258. The court's own good faith definition in the opinion bears this out. Good faith has been limited to the accuracy of listed debts and expenses, fraudulent misrepresentation to the bankruptcy court, and unfair manipulation of the Code. *Id.* at 1349.

259. Bankruptcy is intended to be highly remedial, and Chapter 13 is the most remedial portion of the Code as it contains the broadest discharge provision. All of the requirements of section 1325 are concerned with present and future conduct, not past conduct. 11 U.S.C. § 1325 (1988). See also *Le Maire*, 898 F.2d at 1358 n.16. (Magill, J., dissenting).

260. *Id.* at 1357. (Magill, J. dissenting) (citation omitted) (emphasis in original).

261. *Id.* at 1351. The dissent's point is well taken and neither factor may be considered under Chapter 13. Moreover, the latter factor is present in many bankruptcy filings and is the obvious reason most debtors seek bankruptcy relief. The debtor, if acting honestly, ought not to file bankruptcy until payment efforts have failed.

262. *Id.* at 1353. "[W]e believe that there is a particularly strong public policy prohibiting the discharge of a debt resulting from a willful and malicious injury following an attempted murder." *Id.*

263. *Id.* at 1348. The court's reasoning was sound in rejecting Handeen's contention:

Handeen's reliance upon section 523(a)(6) is unavailing, however, because Le Maire filed his petition under Chapter 13, which does not include section 523(a)(6) in its list of nondischargeable debts. See 11 U.S.C. § 1328(a) (1988). Although section 523(a)(6) does by its express statutory terms apply to a petition for bankruptcy under Chapter 7, its applicability does not extend to a filing under Chapter 13. Therefore, a debt which falls within the scope of section 523(a)(6), such as the debt owed to Handeen, which may not be discharged under Chapter 7, may nevertheless be discharged if the debtor meets the requirements of Chapter 13.

this very same reasoning, the court should have concluded that the public policy rationale behind excepting a section 523(a)(6) debt from discharge under Chapter 7 does not apply to Chapter 13.²⁶⁴ In invalidating *Le Maire*'s plan by relying upon the public policy of section 523(a)(6), the court implicitly adopts the very contention that it claimed to reject—that debts arising out of criminal acts cannot be discharged in bankruptcy. The court thus appears to have written into Chapter 13 an exception to discharge for section 523(a)(6) willful and malicious injury to the creditor.

The decision, however, may be limited to its egregious facts.²⁶⁵ As the dissent points out, the majority is preoccupied with the viciousness of the assault on Handeen.²⁶⁶ If *Le Maire* had not planned the crime, waited for and stalked his victim, and attempted to murder him, would the court still have found *Le Maire*'s motive, sincerity, and good faith lacking? Has the court fully adopted Handeen's position that criminal acts cannot be discharged, or is this third exception limited to attempted murder? Given that James Hartley intended to commit a civil assault against Rickey Jones, would the result in that case change if it were decided after *Le Maire*?

CONCLUSION

The deficiency in the analysis of *Le Maire* by the panel was its finding that the district court's holding was not clearly erroneous in concluding that *Le Maire*'s Chapter 13 plan was proposed in good faith.²⁶⁷ If the good faith requirement is to be given effect, as it must, the courts must deny confirmation of plans when those plans do not meet the good faith standard as it has been defined by the courts. A consideration of *Le Maire*'s questionable debts to his parents and prior submission of an inadequate plan required a contrary conclusion.²⁶⁸

Id. (footnotes omitted).

264. The court criticized the bankruptcy court for *not* considering public policy factors in *Le Maire*'s attempt to discharge his debt under Chapter 13:

We are convinced that the court's analysis here fails to properly consider the strong public policy factors, inherent in the Bankruptcy Code, which are implicated in discharging this debt and gives undue emphasis to the fact that the statutory terms governing Chapter 13 petitions do not expressly make a debt resulting from a willful and malicious injury nondischargeable.

Id. at 1351. The analysis is identical to that cited above in note 263; only the ultimate conclusion is changed.

265. *Id.* at 1353. "Our decision should not be read as a broad declaration extending beyond the facts before us." *Id.*

266. *Le Maire*, 898 F.2d at 1356–57 (Magill, J., dissenting).

267. The court was reviewing the opinion of the district court under a clearly erroneous standard. *In re Le Maire*, 883 F.2d 1373, 1379 (8th Cir. 1989).

268. A review of the facts of *Le Maire* can lead to but one conclusion—that *Le Maire* was attempting to mislead the court and shortchange Handeen by seeking

That conclusion was reached by the court en banc, but by way of faulty reasoning. The court's focus on the pre-filing circumstances out of which the debt arose is contrary to both the literal language and purpose of Chapter 13's broad discharge. The court recognized both of these facts, yet still considered the nature of the assault.²⁶⁹ The court then invoked the public policy behind Chapter 7 to deny LeMaire confirmation under Chapter 13.²⁷⁰ The Eighth Circuit is apparently re-writing the Code to conform with its reading of public policy.²⁷¹

This judicially-promulgated exception to discharge will rarely affect Chapter 13 debtors and creditors. It appears constrained to injuries arising out of acts of attempted murder.²⁷² Had the bankruptcy and district courts considered the *Hartley* case under the *Le Maire* panel standard, would the debt have been clearly nondischargeable under Chapter 7? Or would it still have been a close case?

court confirmation of a plan with as low a repayment dividend as he could get away with.

The general Eighth Circuit good faith standard is that the plan must not constitute "an abuse of the provisions, purpose or spirit of Chapter 13." *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1982) (one of the twelve *Estus* factors to determine good faith is the motivation and sincerity of the debtor in seeking Chapter 13 relief). *See id.* at 317. *Le Maire* clearly ran afoul of the *Estus* motivation and sincerity standard when his second proposed plan was rejected by the bankruptcy court for failure to apply all disposable income to the plan, and failure to propose a plan for the maximum statutory period of 60 months. When a debtor proposes a plan which is deficient, and the deficiency is motivated by a desire on the part of the debtor to retain for himself income which the debtor knows should go to the creditor under the plan, a patent lack of good faith exists. A bankruptcy court, being a court of equity, should not allow a debtor who has acted in bad faith to propose another plan and have the court confirm it.

269. The section 1325 requirements do not concern pre-filing conduct. 11 U.S.C. § 1325 (1988). The court noted that "a Chapter 13 plan may be confirmed despite even the most egregious pre-filing conduct where *other factors* suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims." *Le Maire*, 898 F.2d at 1352 (quoting *Neufeld v. Freeman*, 794 F.2d 149, 153 (4th Cir. 1986)) (emphasis in original). The court also explicitly recognized that "Congress intentionally expanded the scope of the debtor's discharge in Chapter 13" to induce more debtors to repay their debts. *Id.* at 1353.

270. "[W]e believe that the public policies promoted by not discharging a debt resulting from willful or malicious injury in any Chapter 7 case are also implicated in this particular Chapter 13 case" *Id.*

271. The desire to deny confirmation of *Le Maire*'s plan in order that Handeen may receive the full \$50,362.50 judgment due him is a proper end. But the present Code denies courts the means to deny confirmation of such Chapter 13 plans. As the closing line of the dissenting opinion states, "the remedy lies with Congress, not the judiciary." *Id.* at 1361. Unfortunately, Congress has not seen fit to remedy the situation in the more than 10 years that Chapter 13 has been in effect.

272. *See id.* at 1353 ("a willful and malicious injury following an attempted murder").

The *Le Maire* decision was reached by applying Chapter 7 public policy to Chapter 13. It would logically follow that the Chapter 7 nondischargeability standard has not at all been affected by *Le Maire*. Therefore, the Eighth Circuit will continue to require a high standard of malice by the debtor in order to find a debt nondischargeable under Chapter 7; only malice approaching attempted murder will remove a Chapter 13 debt from the realm of dischargeability. The end result is that few if any creditors who challenge debtor bankruptcy plans on section 523(a)(6) grounds will see a change in the ultimate disposition of those plans by the court.

As a matter of public policy it may be desirable to deny to criminals a benefit which exists primarily for honest but unfortunate debtors—discharge in bankruptcy.²⁷³ Also, creditors injured by criminal conduct are especially deserving of the debt owed them. On the other hand, economic reality militates in favor of retaining even for criminal debtors the broad dischargeability offered by Chapter 13. Ultimately the choice involves a trade-off among competing policies, with the creditor appearing the more deserving by virtue of the status as an innocent victim.

Rickey Jones and Paul Handeen were both assaulted by bankruptcy debtors and suffered severe physical injuries. Whether Congress intended to add insult to assault by allowing the discharge of those debts is a question with which the courts will struggle until Congress provides a definitive answer.

Jack R. Fugina

273. Handeen argued that the Eighth Circuit court should adopt a bright line rule automatically precluding from dischargeability debts arising out of criminal conduct. *In re Le Maire*, 883 F.2d 1373, 1373–74 (8th Cir. 1989). He claimed that if discharge were allowed Chapter 13 would become a “haven for criminal debtors.” *Id.* at 1374. Judge Bowman had previously adopted this reasoning in his dissent from the panel’s *Hartley* decision.

